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Testimony of  
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Before the  
**UNITED STATES HOUSE OF REPRESENTATIVES**  
**COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE**  
**SUBCOMMITTEE ON HIGHWAYS AND TRANSIT**

Regarding  
**DRUG & ALCOHOL TESTING OF**  
**COMMERCIAL MOTOR VEHICLE DRIVERS**

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Submitted by



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Good morning Chairman Defazio, Ranking Member Duncan and members of the Subcommittee. Thank you for inviting me to testify this morning on a subject that is of great significance to the men and women who the United States depends upon to move our goods and commodities as well as to keep our nation's economy healthy and vibrant.

My name is Rick Craig. I have been involved with the trucking industry for more than 33 years, first as a truck owner-operator; and then as a representative for our nation's small-business trucking professionals and professional truck drivers. I currently serve as the Director of Regulatory Affairs for the Owner-Operator Independent Drivers Association (OOIDA).

OOIDA is a not-for-profit corporation established in 1973, with its principal place of business in Grain Valley, Missouri. OOIDA is the national trade association representing the interests of independent owner-operators and professional drivers on all issues that affect small-business truckers. The more than 157,000 members of OOIDA are small-business men and women and professional truck drivers located in all 50 states who collectively own and operate more than 240,000 individual heavy-duty trucks. Small businesses dominate the trucking industry in the United States. One-truck motor carriers represent nearly half the total number of active motor carriers operating our country while approximately 96 percent of U.S. motor carriers operate 20 or fewer trucks.

OOIDA believes that drug and alcohol testing for commercial motor vehicle operators has played an important role in raising the level of safety on our nation's highways. However, there are problems with existing regulations, procedures and enforcement that should be addressed to ensure that testing programs are effectively employed while also mindful of the significant harm that may be caused to a trucker's life and livelihood by errant administration.

### **Information, Education and Training**

Drug and alcohol testing regulations that pertain to commercial motor vehicle operators are contained in two separate parts of Title 49 of the Code of Federal Regulations. The provisions of Part 40 cover all parties who conduct drug and alcohol tests required by the U.S. Department of Transportation (DOT) including transportation employers, safety-sensitive transportation employees and service agents. Part 382 is specific to commercial motor vehicle drivers, their motor carrier employers and service agents that fall under the authority of the Federal Motor Carrier Safety Administration (FMCSA). The sheer volume and complexity of the regulations make it extremely difficult for motor carriers to run their own testing programs. Thus, nearly all carriers rely on service agents to administer various aspects of their programs.

Of the many benefit programs and services offered to its membership, OOIDA administers a drug and alcohol testing consortium/third party administrator program (C/TPA). OOIDA's C/TPA provides a full range of services to keep its motor carrier clients and their commercial drivers in compliance with federal drug and alcohol testing requirements, including the dissemination of educational information related to testing and reporting requirements. OOIDA's C/TPA provides all of its members with required educational and training

information including a driver handbook, motor carrier testing policy and a compact disk containing motor carrier supervisor training (*copies of those materials are included with this testimony*). Also, C/TPA personnel and other appropriate association staff are available during extended business hours to answer questions and assist in solving any problems related to the testing rules.

Additionally, OOIDA publishes an instructional booklet for members who are considering obtaining federal motor carrier operating authority that describes the requirements for establishing and maintaining a compliant testing program. The OOIDA Foundation also conducts business seminars that include sessions on drug and alcohol regulations as a part of the standard curriculum.

### **Problems with Drug and Alcohol Testing**

Since its inception in 1990, OOIDA's C/TPA has experienced a multitude of problems with the federal drug and alcohol testing regulations. Most problems are relatively minor and correctable, but nonetheless may serve to illustrate the various reasons why certain carriers and drivers fail to comply. Certain other problems are much more serious and may substantially impact or even destroy a driver's ability to continue to pursue trucking as a career. As I previously mentioned, the sheer volume and complexity as well as the language of the regulations often cause confusion among carriers, drivers, collection site personnel, Medical Review Officers (MROs), Substance Abuse Professionals (SAPs), and federal and state investigators that may result in violations of the rules. Problems that OOIDA's C/TPA has encountered include:

- Carriers. Oftentimes, carriers do not follow through with their obligations and responsibilities, which include (i) providing the required education and training to their drivers and supervisors, (ii) adequately instructing drivers in the carriers' policies and procedures including what to do in the event a test is required, (iii) providing the required referral information, and (iv) responding to other carriers when requesting driver testing history for possible employment.
- Drivers. Many drivers do not understand the educational materials, think the regulations do not apply to them, or simply ignore the obligation to test.
- Specimen Collection. It is often not recognized that collection site personnel can, and sometimes do, make mistakes in the collection process. Personnel have been known to improperly complete the Custody and Control Form (CCF) and provide false instructions to drivers.
- Improper Training for Officials. Currently, there is no certification process for MRO training and knowledge or for SAP training and knowledge.
- Lack of Uniformity. Some federal and state investigators demand records that are not required by the regulations.

The collection process has always been, and remains to be the weakest link in the DOT testing program. While the Department of Health and Human Services (HHS) must certify laboratories that conduct specimen testing, there are no certification requirements for collection sites or collection site personnel. The rules provide for nothing more than a “faith based” approach to available site facilities as well as training and qualification of collection site personnel. Site management itself is trusted to follow the multitude of requirements with little or no oversight. The only real checks and balances in place involve a review upon receipt by laboratory personnel of the CCF to catch obvious paperwork mistakes or omissions as well as to check for any obvious problems with a specimen.

To meet the criteria for a collection facility in the DOT drug and alcohol testing program, collection facilities need only comply with the requirements of the Federal Motor Carrier Safety Regulations (FMCSR), 49 CFR §40.41. There is little to no oversight of those who are “qualified” to act as a specimen collector in the DOT testing program. To act as a specimen collector an individual needs only to meet the training requirements for collectors in the DOT testing program (§40.33). When a collector makes an error during the collection process that results in the cancellation of a test, that collector must undergo error correction training that must take place within 30 days of the date that collector was notified by an MRO of the need to undergo such training. If this training does not take place by the end of that 30 day window, the collector is no longer qualified to conduct DOT specimen collections. DOT regulations also require specimen collectors to undergo refresher training no less frequently than every 5 years from the date the collector originally satisfied the requirements to conduct DOT collections. Employing facilities are required to maintain documentation to demonstrate that their collectors currently meet all DOT requirements. However, it is unclear if any federal agency audits collection facilities to ensure that they and their employees are compliant with DOT regulations. It is also unclear how many specimen collectors are performing DOT collections, but are no longer qualified to do so.

The use of masking agents and specimen adulterant products by individuals hoping to alter or invalidate the outcome of drug and alcohol tests has long been a problem. While the availability of products that are used to subvert drug tests seem to be more prevalent in the internet age, drug tests are increasingly more effective at detecting masking agents and adulterants. These substances can be and are often tested for in specimens along with illegal drugs. Due to the expanded use of such products the FMCSA revised §40.91 and §40.93 to combat their expanded use. If the validity testing procedures set forth by FMCSA are not going far enough to reject specimens that contain such products, the agency should initiate a rulemaking process to modify existing regulations to provide for more effective countermeasures.

Another problem with existing testing regulations and procedures that is of significant concern to OOIDA is the limited opportunities for recourse provided for drivers who test positive and wish to challenge the test result. The only recourse currently available is to have a test completed on a split specimen, which is simply half of the original specimen. This by no means ensures a valid outcome. For example, if a collection facility incorrectly matches a specimen with the wrong donor and the specimen tests positive, a split specimen test will just result in another positive. If a driver is confident that they have not taken any prohibited

substances, it is unclear why the DOT does not accept DNA testing to either prove or disprove that the specimen belongs to the correct donor.

### **Owner-Operators**

Owner-operators commonly lease their equipment and their driving services to motor carriers that operate multiple trucks within their fleet. It is rare for any one owner-operator to be leased to more than one carrier at any given time. Any carrier that leases an owner-operator assumes the responsibility for compliance with all safety regulations, no differently than with their employed drivers. In fact, the FMCSRs specifically include independent contractors, or owner-operators, in the definition of an employee. In a case where an owner-operator leases to more than one carrier at the same time, each carrier is responsible for compliance with the testing rules and the driver must be in each carrier's random selection pool, increasing the odds that the owner-operator will be selected for testing.

Motor carriers are allowed to, and primarily do, contract with service agents to administer, to the extent allowed, their drug and alcohol testing programs. However, carriers are ultimately responsible for ensuring that service agents meet the qualifications set forth in the rules. While a service agent may provide educational materials to the carrier, it is the responsibility of the carrier to provide the materials to its drivers that explain the rules as well as the carrier's policies and procedures. More and more owner-operators are obtaining operating authority and becoming a motor carrier while continuing to perform driving duties. A one truck, one driver motor carrier must comply with both the requirements that apply to employers and the requirements that apply to drivers. Since the driver and carrier management are one in the same, and the carrier must establish the testing program and carrier policies, it is likely that as the driver this individual has a greater awareness of drug and alcohol testing requirements than many others in the trucking industry.

A single-employee carrier must participate in a random drug and alcohol testing program of two or more covered employees in a random testing selection pool. This is accomplished by contracting with a C/TPA to administer the testing program where that carrier participates in the C/TPA's random pool. While service agents are prohibited from performing certain functions required of a motor carrier, there are exceptions where a C/TPA can and does perform certain single-employee carrier duties to ensure the integrity of the carrier's testing program. All agreements between carriers and service agents are deemed, as a matter of law, to require compliance with the drug and alcohol testing regulations.

All carriers, regardless of size, are required to remove a driver from performing safety sensitive functions in the event of a refusal to test, an alcohol test result of 0.04 or higher, a positive drug test result, or a verified or adulterated drug test result. Each carrier must assign a Designated Employer Representative (DER) to oversee this function and various other aspects of the carrier's testing program. Reliance upon a single employee carrier to remove him or herself from duty is little different than simply accepting that any other DER will remove a driver employee from safety sensitive duty.

## **Oregon's Operation Trucker Check**

The state of Oregon reported that voluntary, anonymous urine specimens collected from commercial drivers during "Operation Trucker Check" conducted in both April and September of 2007 returned positive test results for certain types of drugs in nearly 1 out of 10 specimens tested. The tests were reportedly performed by the Oregon State Police Forensic Services Division (FSD). A nearly 10 percent positive testing rate far exceeds the positive rate of less than 2 percent historically reported under the DOT controlled substances testing program. OOIDA has been unable to obtain a comprehensive report that describes the methodology Oregon used to collect and test the specimens. However, there are viable explanations as to why the presence of drugs found in the Oregon efforts exceeds the positive results found under the DOT program.

There are numerous safeguards built into the DOT testing criteria. One such safeguard provides for specific cutoff concentrations for certain drugs or drug metabolites for which testing is required. These cutoff levels are consistent with the standard levels of numerous other national programs. The cutoff levels are employed to minimize the incidence of false positive tests that may result from "innocent" activities such as the ingestion of certain legal substances. A test result may indicate some presence of one or more drugs or drug metabolites, however, under the DOT requirements if the result falls below a cutoff concentration, the test result is considered negative. It is OOIDA's understanding that FSD used no cutoff concentration criteria to guard against false positive test results.

The DOT regulations provide another safeguard by requiring that a confirmation test be performed on all specimens that return a positive result for drugs or drug metabolites at or above the cutoff concentrations discovered during an initial test. The confirmation test involves a more precise analysis of the specimen. It is OOIDA's understanding that FSD performed no confirmation tests on the positive specimens to validate the test results.

The DOT rules also require that a Medical Review Officer (MRO) evaluate test results and determine the accuracy and integrity of the entire collection and testing process. An important part of the MRO's duties involves making contact with a driver for which a positive test result is confirmed to inquire about any medications the driver may have used, or determine whether there is any other legitimate medical explanation. Again, there are many substances that can cause a false positive that could be ruled out during the MRO interview process. These include legally prescribed substances that a doctor has specifically noted to a driver will not hinder their ability to operate a commercial motor vehicle. Under an anonymous collection and testing regime such as Oregon describes there can be no such follow up to determine whether the result is a false positive.

## **Proposal for a National Clearinghouse**

OOIDA fully supports the goal of striving to make the trucking industry free of drug and alcohol abuse. However, OOIDA remains unconvinced of the need for a national clearinghouse for positive drug and alcohol testing results. Not only are we concerned about the effectiveness of such a clearinghouse in actually combating existing drug and alcohol

abuse problems, OOIDA is also concerned about the serious privacy implications of this proposal. Unless the serious operational, security and logistical oversight complications are adequately addressed the proposal has the real potential to negatively impact drivers far beyond the scope of just those who abuse drugs and alcohol.

As previously noted, OOIDA is concerned about the effectiveness of reducing drug and alcohol abuse. The only obvious effect of this proposal is to require that names be compiled in a central database controlled by either the federal government or some private entity. It does not ensure that a carrier removes a violating driver from performing safety functions, nor does it otherwise enhance the existing drug testing requirements. The only thing that this proposal appears to accomplish is to lift a burden from motor carriers' shoulders and reduce carriers' liability with regard to their often inadequate hiring practices. Furthermore, it should be noted that the drug and alcohol abuse rate of the trucking industry is far lower than that of many other industries, yet this proposal would create a costly system with numerous operational and logistical complications.

This proposal raises considerable privacy, operational, security, and oversight concerns. Conducting unreasonable searches and seizures, including those inside the human body, are considered unconstitutional and only when certain public safety considerations are present may the government conduct or require such searches be conducted. OOIDA does not dispute the fact that there is a legitimate governmental interest in ensuring that those who drive large vehicles are drug and alcohol free and capable of operating such vehicles. However, compiling positive test results in a clearinghouse raises the sort of the privacy implications for drivers that the Constitution is designed to protect. How exactly will this information be used? Who will have access to this clearing house? Who will ensure that the system is accessed only by those with authority to do so? How will the government secure the clearinghouse from "hackers" who wish to gain access and view such personal information? Who ensures the accuracy of the reported results? What is to prevent a carrier with a personal vendetta against a driver from falsely reporting a violation of the alcohol testing rules? Once a false positive enters the system how will it be contested and removed? How will the federal system interact with other, state reporting requirements? How will enforcement action be taken? These are but a few questions that must first be answered before OOIDA can support such a system.

The ATA proposal casts a wide net without any assurances that necessary privacy precautions can be accomplished. It is not difficult to envision a number of innocent drivers falling victim to such a system that, on its face, will do nothing to reduce the rate of alcohol and drug use among drivers. This proposal simply shifts the burden of responsibility from the motor carriers to the federal government. After careful review of the proposal, as it now stands, OOIDA believes that any benefits that may result from this proposal may very well be far outweighed by grave and looming detriments and for that reason can not support this endeavor.

## **Other Issues**

FMCSA regulations currently require employers to subject at least 50 percent of the average number of commercial motor vehicle drivers to random drug testing on an annual basis. The regulations also allow the FMCSA Administrator to lower the minimum random drug testing rate for all drivers to 25 percent if, and only if, the industry-wide random positive rate is less than 1 percent for two consecutive calendar years while testing at the 50 percent rate. While the reported positive rate, as derived by FMCSA from aggregate test results provided by a sample of employers, has declined since 1994, the reported rate has never dropped below 1 percent. Further, the reported positive test rate seems to have reached a plateau.

These drug test results under the current regulatory scheme show that the use of a uniform industry-wide level of testing plus the totally random nature of the test selection process – which subjects some drivers to repeated testing while others are rarely or never tested – has allowed some drug users to escape detection. At the same time, the current system subjects the vast majority of drivers, who are not drug users, to a costly and burdensome testing program that does not offer them any direct reward for their continued drug-free status. Nor is there any reward for employers whose exemplary driver hiring and training programs result in a drug-free group of drivers.

OOIDA believes that improved drug test results may be realized if the random drug testing program is modified to focus more directly on detecting the small group of drug users while at the same time rewarding drug-free drivers and their employers with an incentive for continued good performance. This could be accomplished by allowing drivers who have repeatedly tested negative on random drug tests and have never had a positive DOT drug test result of any kind to be removed from the pool of drivers subject to the annual 50 percent random drug testing requirement and be placed in a separate pool that is subject to an annual 25 percent random testing rate. All other drivers – those who have not proven themselves to be drug free – should still be subject to the 50 percent testing requirement.

## **Conclusion**

As I explained in my introduction, OOIDA is an association of the hardworking men and women who are the owner operators and/or the professional drivers of this country. In other words, we are the men and women who are on the roads daily, bringing goods to stores and homes all over North America. We are the men and women behind the wheel and no one knows better than the members of our association the need for drug and alcohol testing as a critical factor in keeping America's highways safe, because after all, unsafe highways put our members directly in harm's way.

I have illustrated for you today some of the many problems that are present in the current drug and alcohol testing system. Such problems include, ensuring the carrier's are fulfilling their responsibilities, educating drivers about their obligations, inadequacies in collecting specimens, improper training for officials, and the lack of uniformity in conflicting systems. If our government works hard to help correct these problems, then we may be able to better strive toward our common goal of keeping the trucking industry free of drug and alcohol abuse. However, in our pursuit of this common goal, we must not lose sight of the basic



liberties and protections to which all people of this land are entitled. As I previously noted, by establishing a federal database to keep the names of those who test positive for drugs and alcohol we will not be combating the problem at hand, but rather creating new obstacles and confusion while jeopardizing the privacy of many hardworking men and women who do not abuse drugs and alcohol. Finally, OOIDA believes that those men and women who have proven themselves free of drugs should be rewarded by being placed in a lower random testing pool.

Chairman DeFazio, Ranking Member Duncan and members of the Subcommittee, thank you for providing me with this opportunity to testify on behalf of the members of OOIDA.

I would be pleased to answer any questions that you may have.